FILED
MAY 16 1983
ALEXANDER L. STEVAS, CLERK

No. 82-1442

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT WAYNE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether exigent circumstances justified the warrantless search of petitioner's home for a fugitive who was the subject of an arrest warrant and was reported to be armed and dangerous and intending to flee the state within the hour.

2. Whether the destruction by state authorities of the marijuana and dynamite found in petitioner's home deprived him of a fair trial.

3. Whether the district court properly instructed the jury concerning petitioner's knowledge of the dynamite found in his closet.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 3a). The petition for a writ of certiorari was filed on February 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of storing dynamite, in violation of 18 U.S.C. 842(j) (Count I), and possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count II). He

was sentenced to concurrent terms of one year's imprisonment on Count I and five years' imprisonment on Count II. The court of appeals affirmed in a per curiam order (Pet. App. 1a-2a).

1. On Saturday, December 13, 1980, Secret Service Agent Michael Restovich received information from the FBI that a fugitive, J.C. Adams, reportedly armed and dangerous, was at petitioner's residence (C.A. App. 12-13). Adams had escaped from the Taylor Mill Police Department on December 11, 1980, following his arrest for possession of substantial amounts of counterfeit money (*id.* at 13, 18). Agent Restovich was also told that Adams was planning to flee the state within the hour (*id.* at 18). In addition, Restovich was advised that petitioner also was believed to be armed and dangerous (*id.* at 13, 18).

Upon receiving this information, Agent Restovich immediately called upon the Kentucky State Police for assistance because a state arrest warrant for Adams had been issued on December 12, 1980, the day after his escape. Restovich and a Kentucky State Trooper then proceeded to petitioner's residence (C.A. App. 13). Restovich did not obtain a search warrant because under then-prevailing Sixth Circuit law a search warrant was not required to execute an arrest warrant for a person located at a third party's residence (*ibid.*). See *Steagald* v. *United States*, 451 U.S. 204, 208 n.3 (1981), citing *United States* v. *McKinney*, 379 F.2d 259, 262-263 (6th Cir. 1967).

While awaiting the arrival of additional Secret Service Agents on the road near petitioner's home, Agent Restovich and Kentucky State Trooper James Daley observed a car driven by petitioner's brother-in-law, Paul Newman. Upon seeing the officers' marked car, Newman stopped his vehicle, put it into reverse, and began backing up the road. Restovich pursued Newman and stopped his vehicle;

Newman then identified a picture of Adams. Newman said that Adams had spent the previous night in petitioner's home, but Newman did not know if Adams was still there (C.A. App. 13).

When federal and state officers arrived at petitioner's home, they ordered everyone onto the front porch and asked about Adams. Petitioner replied that Adams was not there and said that he had not seen Adams for two weeks. Because the officers had information that Adams and petitioner were armed and dangerous, they considered their position on the porch to be open and vulnerable. Without petitioner's consent, Trooper Daley entered petitioner's residence and saw marijuana "sort of laying around" (C.A. App. 12). Upon finding a burlap sack containing marijuana in the attic area, Trooper Daley secured a state search warrant and found additional marijuana, as well as dynamite, in the dining room closet (*id.* at 12).

2. Prior to trial, petitioner moved to suppress the marijuana and dynamite because the officers did not have a search warrant when they entered petitioner's residence. The magistrate, finding that there were exigent circumstances, concluded (C.A. App. 15) that the warrant requirement announced in *Steagald* v. *United States, supra*, did not apply. The magistrate did not reach a separate conclusion concerning the retroactive application of *Steagald*; he simply observed that that question would be moot if the district court were to agree that exigent circumstances were present, but noted that "search and seizure opinions in the past have not been applied on a retroactive basis" (C.A. App. 15). The district court adopted the magistrate's findings of fact and conclusions of law (*id.* at 17-19).

3. The state police took custody of the seized marijuana and turned it over to a state police chemist for analysis (C.A. App. 84-86). Petitioner was then charged under state law with trafficking in drugs. The state court dismissed the

charges and ordered destruction of the marijuana (*id.* at 88, 93-94, 96, 100-102). When state police burned the marijuana in compliance with the state court's order, they were unaware of any forthcoming federal charges (*id.* at 87-88, 95).

The dynamite was extremely dangerous because it had crystallized and had become very hard. Accordingly, it too was destroyed the day after it was seized (1 Tr. 103[1]); however, a sample of the dynamite and a wrapper were sent to the Bureau of Alcohol, Tobacco and Firearms crime lab for analysis (C.A. App. 48-51). In addition, petitioner sought and received permission to have the dynamite analyzed by his own chemist (2 Tr. 123[2]).

ARGUMENT

1. Petitioner first contends (Pet. 4-9) that the search of his home without a warrant was unreasonable, disputing the existence of exigent circumstances. The courts below correctly rejected this fact-bound claim, and further review by this Court is unwarranted.[3]

"Exigent circumstances" refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and without the delay entailed in seeking prior judicial authorization. *United States* v. *Campbell*, 581 F.2d 22, 25 (2d Cir. 1978). The likelihood that the person sought is armed and ready to

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[1]"1 Tr." refers to the transcript of the first day of trial.

[2]"2 Tr." refers to the transcript of the second day of trial.

[3]Petitioner raises no issue concerning the retroactive application of *Steagald;* rather, he disputes only the lower courts' findings of exigent circumstances. Moreover, the court of appeals held (Pet. App. 2a) that *Steagald* is the "critical authority at this time on the question of the validity of the search," and thus it based its affirmance on the district court's factual finding of exigent circumstances.

flee, which increases the chances of an armed confrontation that could result in extreme danger to law enforcement officers and the general public, has long been recognized as a crucial factor in determining the presence of exigent circumstances. See *Wallace* v. *King*, 626 F.2d 1157, 1161 (4th Cir. 1980), cert. denied, 451 U.S. 969 (1981); *United States* v. *Williams*, 612 F.2d 735, 739 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980); *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970).

In the instant case there was probable cause to believe that a fugitive felon who had escaped but two days before was at petitioner's home. The fugitive was reported to be armed and dangerous, as was petitioner himself. The fugitive was also reported to be planning to leave the state within the hour.[4] When the police approached petitioner's home they were vulnerable to possible attack by at least one armed escapee. Under these circumstances, the finding of exigency by the magistrate, the district court, and the court of appeals was amply justified.

2. Next, petitioner contends (Pet. 9-13) that his trial was prejudiced by the destruction of evidence. This claim is totally lacking in merit.

In *United States* v. *Picariello*, 568 F.2d 222, 227 (1st Cir. 1978), the court set forth three factors to consider when evidence is destroyed — (1) the materiality of the evidence, (2) whether the defendant was prejudiced and (3) whether

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[4]In words applicable at least in part to the instant case, this Court pointed out in *Steagald*, *supra*, 451 U.S. at 221-222, that "a warrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive. See *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294 (1967)."

the government was acting in good faith.[5] Applying that test here, it is clear that petitioner received a fair trial.

Contrary to petitioner's assertion that "[t]he evidence was destroyed by state and federal authorities" (Pet. 9), the federal government had no part in the destruction of the evidence. The dynamite was destroyed the day after its seizure by the Newport, Kentucky, Police Bomb Squad, because of its deteriorated and dangerous condition (1 Tr. 103). Following suppression of the marijuana evidence at petitioner's state trial, the state judge ordered it destroyed. It was then destroyed by state authorities who were unaware of any forthcoming federal charges, and no federal authority was present or aware that the marijuana was being destroyed (see pages 3-4, *supra*). Clearly, nothing in the federal government's conduct prejudiced petitioner.

Moreover, petitioner's claim of prejudice from the destruction of the marijuana is somewhat confusing. At trial, petitioner testified in his own defense that he did not know the marijuana was in his house (2 Tr. 29, 37, 39, 46); thus, the nature of the substance was really irrelevant to his defense. Second, petitioner's counsel did not cross-examine the state chemist about the tests he ran and, in fact, advised the trial court that he did not intend to question the chemist "as to whether or not it's marijuana" (C.A. App. 52). Third, two officers testified without objection that what they saw in petitioner's house was marijuana (1 Tr. 67-68, 124). Finally, petitioner's counsel made great use of the marijuana destruction in his closing argument, claiming it was "unfair" and telling the jury that it should acquit petitioner because the government did not produce the evidence (2 Tr. 140-142, 150). In short, it appears that the destruction of the

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[5]See also *United States* v. *Traylor*, 656 F.2d 1326, 1334-1335 (9th Cir. 1981); *United States* v. *Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir.) (en banc), cert. denied, 445 U.S. 917 (1980).

marijuana aided petitioner's defense strategy, enabling him to ask the jury to acquit him because of this "unfair" and "oppressive" prosecution (2 Tr. 140). On these facts, there is no basis for petitioner's claim of prejudice.

3. Finally, petitioner contends (Pet. 13-15) that the trial court's Instruction No. 17 on the dynamite count was clearly erroneous. This contention is without merit or support in the law.

Section 842(j) of Title 18 provides in pertinent part (emphasis added):

> It shall be unlawful for any person to *store* any explosive material in a manner not in conformity with regulations promulgated by the Secretary. * * *

The trial judge instructed the jury:

> In reference to Count I, you are instructed that the defendant did not have to know or be aware of the regulations of the secretary pertaining to the storage of dynamite.
>
> However, you must believe that the defendant knew the dynamite was in the closet. In regards to the defendant's knowlege, you are instructed that a person cannot avoid responsibility by closing his eyes to the obvious and that a defendant can be held responsible for the acts of others if he was aware of those acts; in other words to find the defendant guilty under Count I, you must find beyond a reasonable doubt that the defendant was aware that the dynamite was in the closet.[6]

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[6]The jury instruction is reproduced in a separate volume of the transcript of the trial entitled "Excerpted Portion of Instruction to the Jury," at 17 (Feb. 2, 1982).

Petitioner objected to this instruction (C.A. App. 128). Petitioner cites no authority to support his contention (Pet. 14) that one charged under Section 842(j) with storing dynamite in his own home must *own* the explosive material in question or have some greater degree of physical control over it than a homeowner possesses over the contents of his residence generally. Nor does there appear to be any statutory basis for such a claim, for as the trial judge correctly pointed out, "you can store it without owning it" (2 Tr. 119). Nor, contrary to petitioner's argument, does the instruction suggest that a "mere showing that the Defendant was aware that dynamite *may* be stored in his premises * * * would be sufficient" (Pet. 14). Rather, the court's instruction clearly required the jury to find that petitioner "knew the dynamite was in the closet" or "that [petitioner] was aware that the dynamite was in the closet." Knowledge or awareness that the dynamite was stored in the closet of his own home clearly placed petitioner within the purview of 18 U.S.C. 842(j).[7]

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[7]This issue does not warrant independent review in any event in light of the concurrent sentence doctrine. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). Petitioner was sentenced to concurrent sentences of one year on the dynamite count and five years on the marijuana count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1983

DOJ-1983-05